

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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MIGUEL REYES-CARREON,

Case No. 2:15-cv-00674-JCM-CWH

Petitioner,

ORDER

v.

BRIAN WILLIAMS, et al.,

Respondents.

This habeas matter under 28 U.S.C. § 2254 comes before the court on respondents' motion to dismiss petitioner Miguel Reyes-Carreón's *pro se* petition as untimely (ECF No. 6). Reyes did not file an opposition nor respond to the motion to dismiss in any way. As discussed below, this petition must be dismissed as untimely.

**I. Background**

On March 17, 2005, Reyes-Carreón pleaded guilty pursuant to a written plea agreement to count I, second-degree murder and count II, burglary stemming from an incident in which he entered the home in which his estranged wife resided, had an altercation with the victim there and ultimately stabbed the other man with a kitchen knife, killing him (exhibit 27 to respondents' motion to dismiss).<sup>1</sup> The state district court sentenced Reyes-Carreón as follows—count I: ten years to life; count II: 4 to 10 years, consecutive to count I. Exh. 29. Judgment of conviction was entered on May 2, 2005. Exh. 30.

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<sup>1</sup> Exhibits referenced in this order are exhibits to respondents' motion to dismiss (ECF No. 6) and are found at ECF Nos. 7-10, 12.

1       Reyes-Carreon did not file a direct appeal. On December 27, 2005, he filed his first  
2 proper person state postconviction petition. Exh. 31. On November 15, 2006, the Nevada  
3 Supreme Court affirmed the denial of the petition, and remittitur issued on December 12,  
4 2006. Exhs. 46, 47.

5       On October 25, 2010, Reyes-Carreon filed a proper person motion to correct an illegal  
6 sentence, alleging ineffective assistance of counsel. Exh. 48. On December 23, 2010,  
7 the state district court denied the motion. Exh. 51. Reyes-Carreon appealed. Exh. 60.  
8 On April 5, 2012, Reyes-Carreon filed a proper person motion for clarification of pending  
9 litigation because he was not present when the court orally denied his motion to correct  
10 an illegal sentence. Exh. 57. The court denied the motion on May 8, 2012. Exh. 59.  
11 Reyes-Carreon appealed. Exh. 60, 61.

12       The Nevada Supreme Court dismissed Reyes-Carreon's pending appeals on July 27,  
13 2012. Exh. 63. The court determined that the appeal from the denial of the motion to  
14 correct an illegal sentence was untimely filed, and therefore, the court lacked jurisdiction.  
15 The court also determined that it lacked jurisdiction over the appeal of the denial of the  
16 motion for reconsideration and clarification. *Id.* Remittitur issued August 23, 2012. Exh.  
17 64.

18       On May 1, 2013, Reyes-Carreon filed his second proper person state habeas petition.  
19 Exh. 65. On October 16, 2014, the Nevada Supreme Court affirmed the denial of the  
20 second state petition, agreeing that the petition was untimely pursuant to NRS 34.726,  
21 successive and an abuse of the writ pursuant to NRS 34.810, and barred by laches  
22 pursuant to NRS 34.800. Exh. 82. The court further concluded that Reyes-Carreon failed  
23 to demonstrate good cause and prejudice to overcome the state procedural bars. *Id.*  
24 Remittitur issued on November 13, 2014. Exh. 83.

25       On March 24, 2015, Reyes-Carreon filed his third proper person state postconviction  
26 petition. Exh. 84. The state district court denied the petition on August 20, 2015. Exh.  
27 5, p. 32. Petitioner did not appeal the denial of his third state petition.  
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1 Meanwhile, on or about April 1, 2015, Reyes-Carreón dispatched his federal habeas  
2 petition for mailing on July 22, 2013 (ECF No. 10). Respondents have moved to dismiss  
3 the petition as time-barred and, additionally, on the bases that the claims are unexhausted  
4 and/or not cognizable in federal habeas corpus (ECF No. 6).

5 **II. Legal Standards**

6 **A. Statute of Limitations**

7 The Antiterrorism and Effective Death Penalty Act (AEDPA) went into effect on April  
8 24, 1996 and imposes a one-year statute of limitations on the filing of federal habeas  
9 corpus petitions. 28 U.S.C. § 2244(d). The one-year time limitation can run from the date  
10 on which a petitioner's judgment became final by conclusion of direct review, or the  
11 expiration of the time for seeking direct review. 28 U.S.C. § 2244(d)(1)(A). Further, a  
12 properly filed petition for state postconviction relief can toll the period of limitations. 28  
13 U.S.C. § 2244(d)(2).

14 A petitioner may be entitled to equitable tolling if he can show “(1) that he has been  
15 pursuing his right diligently, and that (2) some extraordinary circumstance stood in his  
16 way’ and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2009)(quoting  
17 prior authority). Equitable tolling is “unavailable in most cases,” *Miles v. Prunty*, 187 F.3d  
18 1104, 1107 (9th Cir. 1999) and “the threshold necessary to trigger equitable tolling is very  
19 high, lest the exceptions swallow the rule,” *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th  
20 Cir. 2002) (quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000)). The  
21 petitioner ultimately has the burden of proof on this “extraordinary exclusion.” 292 F.3d  
22 at 1065. He accordingly must demonstrate a causal relationship between the  
23 extraordinary circumstance and the lateness of his filing. *E.g.*, *Spitsyn v. Moore*, 345 F.3d  
24 796, 799 (9th Cir. 2003).

25 Ignorance of the one-year statute of limitations does not constitute an extraordinary  
26 circumstance that prevents a prisoner from making a timely filing. *See Rasberry v.*  
27 *Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (“a *pro se* petitioner's lack of legal  
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sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling”).

### **B. Exhaustion**

A federal court will not grant a state prisoner’s petition for habeas relief until the prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his claims before he presents those claims in a federal habeas petition. *O’Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the petitioner has given the highest available state court the opportunity to consider the claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir. 1981).

### **III. Instant Action**

Reyes-Carreon sets forth five grounds for relief in the petition (ECF No. 4). He contends in ground 1 that pursuant to the 2014 Nevada Supreme Court decision in *State v. White*, 330 P.3d 482 (Nev. 2014), he could not be guilty of the elements of burglary. *Id.* at 3. In ground 2 he alleges that trial counsel refused to file a timely notice of appeal. *Id.* at 5. In ground 3 he asserts that he has always alleged self-defense, the testimony presented at the preliminary hearing was false and was corrected by sworn affidavits, the police threatened witnesses, and his trial counsel was ineffective for failing to provide pre-trial investigation including into the threats by police. *Id.* at 9. As ground 4 he contends that trial counsel was ineffective for failing to assist his client, failing to develop a self-defense theory, coercion, and failing to conduct pre-trial investigation which forced Reyes-Carreon to enter a guilty plea. *Id.* at 7. As ground 5 he argues that, based on *White*, which was given retroactive effect, the elements of burglary were not met in his case and he should be permitted to withdraw his guilty plea to prove he is actually innocent of second-degree murder and to prove self-defense. *Id.* at 11.

1           The AEDPA one-year statute of limitations began to run in December 2006, when  
2 remittitur issued after the Nevada Supreme Court affirmed the denial of Reyes-Carreón's  
3 first state postconviction petition. Exhs. 46, 47. However, Reyes-Carreón filed nothing  
4 further in state or federal court until almost four years later when he filed a proper person  
5 motion to correct an illegal sentence in state district court on October 25, 2010. Exh. 48.  
6 Reyes-Carreón did not submit his federal petition for filing until about April 1, 2015. This  
7 federal petition is, therefore, time-barred, unless Reyes-Carreón is entitled to equitable  
8 tolling of the AEDPA statute of limitations. As this court has noted, Reyes-Carreón has  
9 failed to oppose the motion to dismiss or respond in any way.

10           First, pursuant to Local Rule 7-2(d), petitioner's failure to oppose constitutes consent  
11 to the granting of the motion. Second, unquestionably, federal grounds 2, 3, and 4 are  
12 time-barred. Reyes-Carreón was aware of the factual allegations underlying these claims  
13 at and/or immediately after the time that he entered his guilty plea, yet he took no action  
14 whatsoever for almost four years. §2244(d). He has not even argued that he is entitled  
15 to equitable tolling on any basis.

16           Finally, federal grounds 1 and 5 relate to the potential effect of the Nevada Supreme  
17 Court's 2014 decision in *State v. White* on Reyes-Carreón's plea of guilty to the burglary  
18 count. He first raised these claims in his third state habeas petition, filed in March 2015.  
19 However, even assuming, without deciding, that Reyes-Carreón may have timely raised  
20 these claims in his third state habeas petition, the state district court denied the petition  
21 in August 2015, and petitioner failed to appeal the denial to the Nevada Supreme Court.  
22 Accordingly, federal grounds 1 and 5 are unexhausted. Moreover, to the extent that  
23 federal grounds 1 and 5 may allude to actual innocence of the burglary count, Reyes-  
24 Carreón has failed to set forth factual allegations that would demonstrate that the  
25 circumstances in his case would fall within those addressed in the *White* case. *McQuiggin*  
26 *v. Perkins*, 133 S.Ct. 1924, 1928 (2013); *Schlup v. Delo*, 513 U.S. 298 (1995); *State v.*  
27 *White*, 330 P.3d 482 (Nev. 2014).  
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1 As discussed above, respondents' unopposed motion to dismiss this petition as time-  
2 barred and for failure to exhaust is granted. This petition is dismissed with prejudice.

3 **IV. Certificate of Appealability**

4 In order to proceed with an appeal, petitioner must receive a certificate of  
5 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v.*  
6 *Ornoski*, 435 F.3d 946, 950-51 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d  
7 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make "a substantial showing of  
8 the denial of a constitutional right" to warrant a certificate of appealability. *Id.*; 28 U.S.C.  
9 § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The petitioner must  
10 demonstrate that reasonable jurists would find the district court's assessment of the  
11 constitutional claims debatable or wrong." *Id.* (quoting *Slack*, 529 U.S. at 484). In order  
12 to meet this threshold inquiry, the petitioner has the burden of demonstrating that the  
13 issues are debatable among jurists of reason; that a court could resolve the issues  
14 differently; or that the questions are adequate to deserve encouragement to proceed  
15 further. *Id.* Pursuant to Rule 11(a) of the Rules Governing Section 2254 and 2255 Cases,  
16 district courts are required to rule on the certificate of appealability in the order disposing  
17 of a proceeding adversely to the petitioner or movant, rather than waiting for a notice of  
18 appeal and request for certificate of appealability to be filed. This court has considered  
19 the issues raised by petitioner, with respect to whether they satisfy the standard for  
20 issuance of a certificate of appealability, and determines that none meets the standard.  
21 The court will therefore deny petitioner a certificate of appealability.

22 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss the petition (ECF  
23 No. 6) is **GRANTED** as set forth in this order. The petition is **DISMISSED** with prejudice.

24 **IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED**.

25 **IT IS FURTHER ORDERED** that respondents' motion to file exhibit 89 under seal  
26 (ECF No. 11) is **GRANTED**.

DATED: August 2, 2016.

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